

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT GONZALES,

Plaintiff, No. CIV S-04-1064 FCD CMK P

vs.

S. PALAGUMMI,

Defendant. ORDER

Currently before the court are the following motions. Plaintiff's April 11, 2005 motion for an extension of time to effect discovery. Plaintiff's April 11, 2005 motion to strike Section III of defendant's motion to dismiss, which pertains to plaintiff's state law negligence claim, and defendant's motion for a protective order regarding discovery.

The court has not issued any discovery order in this case. Plaintiff appears to have filed his April 11, 2005 motion to extend time to file and serve discovery in response to plaintiff's motion to dismiss his complaint for failure to exhaust administrative remedies. Defendant opposes plaintiff's request for an extension on the grounds that discovery is inappropriate at this juncture as all salient facts are not before the court. The exhaustion requirement does not impose a pleading requirement on the prisoner, but instead creates a defense that must be raised and proved by defendant. There is no need for plaintiff to conduct any discovery to respond to defendant's motion as he bears no burden to refute the claims that he

1 failed to exhaust. Wyatt v. Terhune, 315 F.3d 1108, 1117 n.9 & 1119 n.13 (9th Cir.2003).

2 Accordingly, plaintiff's motion for an extension of time to effect discovery is denied.

3 In his April 11, 2005 motion to strike part III of defendant's motion to dismiss,
4 plaintiff states that his complaint does not set forth any state law claims and that he is proceeding
5 exclusively on federal claims under 42 U.S.C. § 1983. On the condition that plaintiff is
6 proceeding solely on federal claims, defendant does not oppose plaintiff's motion to strike.
7 Accordingly it is granted.

8 Finally, on April 18, 2005, defendant filed a motion to stay discovery on the
9 grounds that discovery is inappropriate at this time in light of the pending motion to dismiss
10 plaintiff's complaint for failure to exhaust. On April 25, 2005, plaintiff filed a response
11 opposing defendant's motion and defendant filed a reply to plaintiff's response on April 27,
12 2005. Plaintiff asserts that it is necessary for him to undertake discovery to respond to the
13 pending motion to dismiss. However, as noted above, defendant bears the burden of showing
14 that plaintiff has failed to exhaust his administrative remedies. Further, except for the request for
15 production of documents propounded to defendant on April 20, 2005, the discovery requested by
16 plaintiff has no bearing on his exhaustion of his administrative remedies. Defendant is directed
17 to respond to plaintiff's April 20, 2005 discovery request. All other discovery in this case is
18 stayed pending the court's ruling on defendant's motion to dismiss.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

1 IT IS ORDERED that:

2 1. Plaintiff's April 11, 2005 motion for an extension of time is denied;

3 2. Plaintiff's April 11, 2005 motion to strike Section III of defendant's motion to

4 dismiss is granted;

5 3. Defendant is ordered to respond to plaintiff's April 20, 2005 discovery request

6 and;

7 4. Plaintiff's motion for a protective order staying discovery is granted; discovery

8 is stayed pending the court's ruling on defendant's motion to dismiss, at which time, if

9 appropriate, the court will issue a discovery order.

10 DATED: May 9, 2005

11
12 /s/ CRAIG M. KELLISON
13 Craig M. Kellison
14 UNITED STATES MAGISTRATE JUDGE